

Appendix 3C

Training Memo: Making the Arrest Decision

Officers must answer several key questions in making arrest decisions in domestic violence cases:

1. Is there probable cause that a crime has been committed?
2. Does PD policy require an arrest under the circumstances of the crime or is arrest discretionary?
3. When both parties have used violence, did one party act in self-defense?
4. When both parties have used violence, but neither acted in self-defense, who is the predominant aggressor?

Probable Cause Determination

The legal standard for making an arrest is probable cause. Probable cause to arrest a person exists when the officer reasonably believes that the person has committed a crime, based on the officer's observations, inferences, and experience.¹ In making this determination the officer should consider the totality of facts and circumstances.²

The officer must use caution and prudence in making the decision to arrest, meaning that the officer should consider and later document all the evidence readily available at the time of the decision. The officer begins the process of considering the facts when reading the dispatch transmission. Consider, for example, a CAD entry that reads *“woman screaming, neighbor thinks he’s hitting her.”* In this situation, there is no requirement that there be corroborating evidence such as a visible injury. If believed, the words of victim are sufficient to establish probable cause. By the same token, the existence of an injury alone is not complete information. The officer must determine how the injury occurred, whether the suspect inflicted it, and whether the injury might be the result of actions in self-defense.

¹ State v. Olson, 436 N.W.2d 436 (Minn. 1989).

² Illinois v. Gates, 462 U.S. 213, 230-31 (1983).

Self-Defense Determination

Self-defense means that the person reasonably believed that he or she was in imminent danger and force was necessary, and the person used only the level of force reasonably necessary to prevent the harm feared. There is no duty to retreat from one's own home when acting in self-defense, but the lack of duty to retreat does not cancel the obligation to act reasonably when acting in self-defense. The elements of self-defense are:

1. The person using force had a reasonable belief that she or he was at risk of bodily harm. This means the officer needs to ask questions such as:
 - What did you think was going to happen?
 - What were you thinking when you picked up the knife?
 - What made you think that?
 - Why weren't you going to let him come near you? What did you think would happen?"
2. The risk of harm is actual or imminent. The risk cannot be for some undetermined time in the future.
3. The use of force was reasonably necessary to prevent the infliction of bodily harm. The amount of force that is reasonable for one person is not necessarily what is reasonable for another. For example, a stronger person cannot use the same amount of force that a person with less physical strength can use.
4. The use of force is based on the person's beliefs at the time of the incident about the risk, immediacy of the risk, and force necessary to prevent harm, not on the intent of the person making the threat.

Predominant Aggressor

Remember: *always* make a self-defense determination before doing a predominant aggressor determination. Predominant aggressor only applies when the officer has determined that both parties acted illegally and neither acted in self-defense.

The predominant aggressor is not necessarily the person who hits first. The predominant aggressor is determined by considering a number of factors and balancing the weight of these factors to determine who is causing the greatest

harm and using the most aggression. Consider the following when making a predominant aggressor determination:

- Who used the most force in this incident?
- Who appears to use the highest level of violence in the relationship?
- Who has a history of violence?
- Who has a history of past protection or harassment orders from this victim or other victims?
- Who poses the greatest ongoing threat to the other?
- Who appears to be the most afraid of the other or especially afraid of future injury?
- What are the actions of each party relative to the PD domestic violence policy and mission to protect victims of ongoing abuse and create a general deterrence to battering?
- What is the likelihood of each suspect to cause future injury?
- What is each person's fear of being injured by the other?
- What is the comparative strength of the parties?
- What is each party's purpose in using violence? For example, to control the other's aggression or future use of violence; or to place the victim in fear for their safety or their children's safety?
- Has either party used sexual aggression toward the other?

Excluded Factors

The elements of a crime supported by probable cause and determination of self-defense or predominant aggressor when warranted are the elements of an investigation and arrest decision. Arrests should be made without regard to:

- A person's marital status, sexual orientation, religion, age, race, culture, immigration status or socio-economic position (including public or professional status or occupation, such as police officer)
- Property ownership, tenancy rights of either party, or the fact the incident occurred in a private place

- Belief that the victim may not cooperate with criminal prosecution or that the arrest may not lead to a conviction
- Belief that the arrest will not lead to prosecution
- Verbal assurances that the abuse will stop
- Disposition of previous police calls involving the same victim or suspect
- Denial by either party that the abuse occurred when there is evidence of domestic abuse
- Lack of a court order restraining or restricting the suspect
- Adverse financial consequences that might result from arrest
- Use of alcohol or drugs, or intoxication of the parties
- Victim's emotional state
- Whether physical injuries suffered by the victim can be personally observed by the officer at the time of the law enforcement response